Note

Do Professional Degrees and Licenses Earned During Marriage Constitute Marital Property?: An Irrelevant Issue

I. INTRODUCTION

Modern societal changes in both the increased flexibility of gender roles and the increased educational training of the American populace have manifested themselves in what has been termed the "student-spouse/working-spouse syndrome."[1] An issue that often arises when such a couple divorces shortly after the attainment of educational success is whether a professional degree or license earned during marriage constitutes marital property subject to equitable distribution.[2]

This Note seeks to address this question by analyzing two recent cases involving the issue. In *Stevens v. Stevens*,[3] Ohio answered this question negatively, while New

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1. *See* Conner v. Conner, 97 A.D.2d 88, 92, 468 N.Y.S.2d 482, 486 (1983).

2. A majority of the courts that have addressed this question have answered negatively. In community property states, where all marital property is divided evenly upon divorce, the consensus is that professional degrees and licenses are not marital property. *See* Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (1982) (legal education not community property); Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (1981) (medical license not community property); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (law degree not community property); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (law degree not community property); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (educational degree not community property); Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972) (medical license not community property); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Ct. App. 1980) (medical education not community property).

Furthermore, a majority of jurisdictions that have interpreted their respective equitable distribution statutes with regard to this issue have reached a similar conclusion. *See* Hughes v. Hughes, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983) (educational degree not marital property); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981) (enhanced earning capacity represented by medical degree not marital property); *In re* Marriage of McManama, 272 Ind. 483, 399 N.E.2d 371 (1980) (enhanced earning capacity represented by law degree not marital property); Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977) (enhanced earning capacity represented by doctoral degree not marital property); Leveck v. Leveck, 614 S.W.2d 710 (Ky. Ct. App. 1981) (medical degree and license not marital property); Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (medical degree not marital property); Ruben v. Ruben, 123 N.H. 358, 461 A.2d 733 (1983) (enhanced earning capacity represented by doctoral degree not marital property); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) (Masters of Business Administration degree not marital property); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975) (earning capacity represented by law degree not marital property); Hill v. Hill, 182 N.J. Super. 616, 442 A.2d 1072 (App. Div.), *aff'd*, 91 N.J. 506, 453 A.2d 537 (1982) (license to practice dentistry not marital property); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (professional degree and license not marital property); DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980) (law degree not asset of marital estate).

A few courts, however, have held that their respective equitable distribution statutes do permit professional degrees and licenses to be considered marital property under appropriate circumstances. *See In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (future earning potential represented by law degree is marital property); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979) (medical license is marital property); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (law degree is marital property).

For further discussion of the holdings of other jurisdictions with regard to this issue, see Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301, 303 n.8 (1983) [hereinafter *Equitable Distribution*].

3. 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986).

York responded affirmatively in *O'Brien v. O'Brien*.[4] The Note will begin with a discussion of these two cases and the rationales employed in arriving at their respective conclusions. The Note will then explore the many policy arguments supporting each side of this issue. Finally, it will argue that regardless of how a court resolves this question, the restitution measure constitutes the most equitable solution to the difficulties often arising when a couple divorces shortly after one spouse has attained a professional degree or license.[5]

II. THE *STEVENS* AND *O'BRIEN* DECISIONS

A. Stevens v. Stevens: *Ohio Adopts the Traditional Approach*

1. *Facts and Procedural History*

The facts as found by the trial court in the *Stevens* case disclose a classic example of the student-spouse/working-spouse syndrome. The parties met in high school and married upon their graduation in 1967. The parties agreed that Mrs. Stevens would continue her employment as a secretary while Dr. Stevens attended college.[6] Following attainment of his bachelor's degree, Dr. Stevens enrolled in the Auburn University School of Veterinary Medicine. Dr. Stevens graduated from Auburn in 1975 and soon began work as a staff veterinarian and assistant curator at Sea World in Aurora, Ohio.[7]

Mrs. Stevens worked at various secretarial and administrative positions throughout Dr. Stevens' eight years of study.[8] The trial court determined that during this time Mrs. Stevens not only supplied the entire financial support of the household, but paid for Dr. Stevens' educational expenses as well.[9]

The parties divorced in 1984. The marital assets consisted mainly of two cars and the family home, all of which were subject to liens.[10] Mrs. Stevens claimed that the enhanced earning capacity represented by Dr. Stevens' veterinary degree also constituted marital property and should therefore be subject to equitable distribution. The trial court disagreed and awarded Mrs. Stevens the home, one car, and alimony in the sum of 400 dollars per month.[11] Further, this alimony award was subject to

4. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

5. The assertion here is not that the restitution measure constitutes a novel approach to this issue. Indeed, a few courts have attempted to apply (albeit loosely and imprecisely in some instances) this measure to cases involving the student-spouse/working-spouse syndrome. *See* Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979) (in determining the nonstudent spouse's portion of a dentistry license, the court must consider both the future earning potential of the license and the nonstudent spouse's contribution to the license); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (a nonstudent spouse is entitled to a cash award based on her contribution to a medical license); DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980) (although future earning capacity of a law degree is not the proper measure of valuation, some remuneration for nonstudent spouse is required). Rather, this Note seeks to show that the restitution measure, which is clearly a minority position at present, both serves the interests of equity in general and would have produced more equitable results in *Stevens* and *O'Brien* specifically.

6. Stevens v. Stevens, 23 Ohio St. 3d 115, 115, 492 N.E.2d 131, 131–32 (1986).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 116, 492 N.E.2d at 132.

11. *Id.*

termination upon Mrs. Stevens' remarriage, her "living in a state of concubinage," or her acquisition of gainful employment.[12] In any event, the alimony was not to extend beyond three years.[13]

On appeal by Mrs. Stevens, the court of appeals stated that the future earning capacity of the veterinary degree should be considered when determining the alimony figure. Nevertheless, the court of appeals affirmed the figure of 400 dollars per month.[14]

Mrs. Stevens subsequently appealed to the Supreme Court of Ohio, which held that the veterinary degree was not marital property.[15] The Supreme Court, however, agreed with the court of appeals that the degree should be considered in determining the amount of alimony and remanded the case for redetermination of this figure.[16] Further, the court removed those limitations that required an automatic cessation of alimony after three years, upon Mrs. Stevens' "living in a state of concubinage," or following her gainful employment.[17] However, the court retained the limitation that called for an automatic end to alimony payments in the event Mrs. Stevens remarried.[18]

2. *The Court's Analysis*

The Ohio Supreme Court began its analysis of the marital property issue by noting that professional degrees and licenses cannot properly be termed "property," since they lack the traditional characteristics of property.[19] For this part of its discussion the court relied heavily on In re *Marriage of Graham*,[20] the leading case holding that professional degrees and licenses do not constitute marital property.

The *Graham* court had stated that the traditional characteristics of property, which include transferability of ownership, are not present in the case of professional degrees and licenses.[21] Indeed,

> it [a professional degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. . . . [I]t has none of the attributes of property in the usual sense of that term.[22]

Stevens, like *Graham* before it, stressed that the acquisition of a professional degree or license is not merely the product of an expenditure of time and money. *Stevens* quoted *Graham* when it stated: "An advanced degree is a cumulative product

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 120, 492 N.E.2d at 135.
16. *Id.* at 122, 492 N.E.2d at 136–37.
17. *Id.* at 121–22, 492 N.E.2d at 136.
18. *Id.*
19. *Id.* at 117, 492 N.E.2d at 133.
20. 194 Colo. 429, 574 P.2d 75 (1978).
21. *Id.* at 432, 574 P.2d at 76–77.
22. Stevens v. Stevens, 23 Ohio St. 3d 115, 117–18, 492 N.E.2d 131, 133 (1986) (quoting *In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978)).

of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property."[23]

The *Stevens* court also objected to the high degree of speculation required to reduce the future earning potential of a professional degree or license to its present value. Mrs. Stevens had argued that expert testimony could be used to establish this value.[24] The court responded that such a calculation would necessarily require speculation as to the future occupation of Dr. Stevens, his future salary in that occupation, and the length of his employment in that occupation. The *Stevens* court concluded that such a high degree of uncertainty was unacceptable.[25]

Finally, the Ohio Supreme Court refused to impose "professional servitude" on Dr. Stevens.[26] The court contended that the imposition of a property settlement debt on Dr. Stevens would require him to make large cash payments to satisfy Mrs. Stevens' interest in the degree. Such a burden, the court reasoned, would unfairly force Dr. Stevens to retain his position as a veterinarian, since his departure from that profession would likely necessitate a substantial cut in salary and since a property award cannot be modified after the divorce to reflect a change in circumstances.[27] Therefore, the court concluded, a decision holding that the degree was marital property would likely have strapped Dr. Stevens into a lifetime of practicing veterinary medicine, regardless of any desire for career change that he may have entertained.[28]

The court defended its adoption of the traditional view of property on grounds that any expansion of the breadth of that term should come at the initiative of the Ohio General Assembly, not the judiciary. It noted that legislative action provided the foundation upon which many of those states that have found professional degrees and licenses to constitute property based their decisions.[29]

Even though it rejected the marital property theory, the Ohio Supreme Court did express an interest in providing at least some compensation to Mrs. Stevens for her financial contributions to Dr. Stevens' degree. Although the veterinary degree was held not to be an asset of the marriage, the court declared that the future earning capacity of the degree should be "an element to be considered in reaching an equitable award of alimony."[30] Thus, the court remanded the case for a redetermination of Mrs. Stevens' alimony on the basis of the future earning capacity of the veterinary degree, and not on the basis of her past financial contribution to the attainment of that degree. Further, the trial court, on remand, apparently would be permitted to make the alimony payments contingent upon the failure of Mrs. Stevens to remarry.[31]

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23. *Id.*
24. *Id.* at 118–19, 492 N.E.2d at 133–34.
25. *Id.*
26. *Id.* at 117, 492 N.E.2d at 132–33.
27. *Id.* at 118, 492 N.E.2d at 133.
28. *Id.* at 117–18, 492 N.E.2d at 132–33.
29. *Id.* at 120 n.5, 492 N.E.2d at 135 n.5.
30. *Id.* at 119, 492 N.E.2d at 134.
31. *Id.* at 121–22, 492 N.E.2d at 136.

B. O'Brien v. O'Brien: *New York Adopts the Marital Property Approach*

1. *Facts and Procedural History*

The facts of *O'Brien* are not unlike those involved in *Stevens*. In *O'Brien*, the parties married in 1971. At the time of marriage, Dr. O'Brien was a college dropout and Mrs. O'Brien possessed a temporary teaching certificate.[32] Although Mrs. O'Brien required eighteen months of postgraduate work before qualifying for a permanent teaching certificate, she discontinued her own education to assist in financing Dr. O'Brien's return to college.[33]

Dr. O'Brien completed his undergraduate studies and subsequently entered medical school as a full-time student. Mrs. O'Brien worked full time during Dr. O'Brien's enrollment, while Dr. O'Brien worked at various part-time positions.[34] Dr. O'Brien obtained his medical license in 1980, and the parties separated shortly thereafter.[35]

The trial court found that throughout the course of the marriage, Mrs. O'Brien had personally accounted for seventy-six percent of the couple's income, much of which was used to finance Dr. O'Brien's medical education.[36] Further, the court found that Mrs. O'Brien had made substantial nonfinancial contributions to the marriage through her role as homemaker. Finally, the court noted that, with the exception of the medical license, there were no substantial marital assets.[37]

The trial court determined that Dr. O'Brien's medical license was marital property within the meaning of New York's Domestic Relations Law.[38] After surmising that Mrs. O'Brien's portion of the license was forty percent, the court accordingly awarded her the sum of 188,800 dollars.[39] The appellate division reversed, holding that the trial court had erred in finding that a professional license obtained during marriage constituted marital property.[40] Instead, the appellate division sought to compensate Mrs. O'Brien by ordering a maintenance award that was to take into consideration Mrs. O'Brien's contributions to Dr. O'Brien's future earning capacity.[41] On appeal, the New York Court of Appeals reversed, finding that Dr. O'Brien's medical license did indeed constitute marital property.[42]

2. *New York's Domestic Relations Law*

The *O'Brien* court placed the issue of professional degrees and licenses into its modern statutory context. In 1980, the New York Legislative Assembly passed the

32. O'Brien v. O'Brien, 66 N.Y.2d 576, 581, 489 N.E.2d 712, 713–14, 498 N.Y.S.2d 743, 744–45 (1985).
33. *Id.*
34. *Id.* at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.
35. *Id.*
36. O'Brien v. O'Brien, 114 Misc. 2d 233, 236, 452 N.Y.S.2d 801, 803 (Sup. Ct. 1982).
37. *Id.*
38. *Id.* at 239, 452 N.Y.S.2d at 803.
39. *Id.* at 241, 452 N.Y.S.2d at 806.
40. O'Brien v. O'Brien, 106 A.D.2d 223, 228, 485 N.Y.S.2d 548, 552 (1985).
41. *Id.* at 232, 485 N.Y.S.2d at 554–55.
42. O'Brien v. O'Brien, 66 N.Y.2d 576, 584, 489 N.E.2d 712, 715–16, 498 N.Y.S.2d 743, 746–47 (1985).

Domestic Relations Law.[43] Referred to as a "sweeping reform" of New York divorce law,[44] the statute sought to introduce "fairness" into property division upon divorce.[45]

This statute replaced New York's common law treatment of property division upon divorce,[46] and introduced to New York the concept of equitable distribution. The New York Legislative Assembly incorporated the concepts of "marital property" and "separate property." Separate property includes property owned by each of the spouses prior to marriage. The statute goes on to define other forms of separate property.[47] Marital property, which is subject to equitable distribution upon divorce, is defined as property that was acquired by the couple after marriage but before divorce, and that is not separate property.[48]

Thus, the specific issue addressed by the *O'Brien* court was whether Dr. O'Brien's medical license constituted "property" within the meaning of the statute, and, if so, whether it was separate or marital property.[49] The court determined that an interest in a professional career earned during marriage is marital property and hence is subject to equitable distribution upon divorce.[50]

3. *The Court's Analysis*

The New York Court of Appeals began its analysis by rejecting Dr. O'Brien's contention that a medical license is not property. Although conceding that a medical license did not fall within traditional concepts of common law property,[51] the court claimed that marital property is a "statutory creature."[52] The court declared that the New York Legislative Assembly "deliberately went beyond traditional property concepts" when it enacted the Domestic Relations Law.[53] Indeed, the court

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43. N.Y. DOM. REL. LAW § 236 (McKinney 1986).

44. Governor's Memorandum on Approval of ch. 281, N.Y. Laws (June 19, 1980), *reprinted in* 1980 N.Y. Laws 1863.

45. *See* Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67 (1980).

46. New York was a title theory jurisdiction prior to adopting this statute. Under the title theory, upon divorce each spouse retained those items to which he or she possessed title. The potential inequities of such a system led to the adoption of the Domestic Relations Law in 1980. *See* Dean, *Economic Relations Between Husband and Wife in New York*, 41 CORNELL L.Q. 175, 183–88 (1956); *Equitable Distribution*, *supra* note 2, at 301, 302 n.7.

47. The statute defines "separate property" as follows:

> (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
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> (2) compensation for personal injuries;
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> (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
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> (4) property described as separate property by written agreement of the parties pursuant to [a separation agreement].

N.Y. DOM. REL. LAW § 236(B)(1)(d) (McKinney 1986).

48. Specifically, the statute defines "marital property" as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held. . . . Marital property shall not include separate property" as defined in subsection (d). N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 1986).

49. O'Brien v. O'Brien, 66 N.Y.2d 576, 580, 489 N.E.2d 712, 713, 498 N.Y.S.2d 743, 744 (1985).

50. *Id.* at 580–81, 489 N.E.2d at 713, 498 N.Y.S.2d at 744.

51. *See supra* notes 19–23 and accompanying text.

52. O'Brien v. O'Brien, 66 N.Y.2d 576, 583, 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 746 (1985).

53. *Id.*

contended, the statute expanded the definition of property to include all "things of value" that were acquired during marriage.[54]

The court supported this interpretation by first discussing the legislative intent behind the statute and then by analyzing how this intent manifested itself in the text of the statute. The court began by looking at those sections of the statute that address the division of marital property. The statute states in part:

> In determining an equitable disposition of [marital] property, the court shall consider:
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> . . .
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> (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the *career or career potential of the other party*;
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> . . .
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> (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or *profession* . . . .[55]

According to the court, the emphasized portions of the statute indicated that the legislature intended marital property to include medical licenses earned during marriage since these licenses are within the realm of "profession" and "career or career potential."[56] The court concluded that since the statute includes references to items such as educational degrees and professional licenses when discussing the *division* of marital property, the legislature must have intended to include such items within its *definition* of marital property.[57] While the court's analysis seemingly placed the cart before the horse, such an analysis may be helpful when, as here, the court is forced to grapple with the elusive notion of legislative intent.

The court bolstered its interpretation of the statute with several policy arguments regarding the student-spouse/working-spouse syndrome, all made more compelling when applied to the facts of the case. First, the court stated that the nonstudent spouse often contributes a disproportionately high percentage of the marital income, as was the situation in *O'Brien*.[58] Second, the court noted that oftentimes, as was the case here, the nonstudent spouse postpones or even sacrifices his or her own educational opportunities in order to financially assist the student spouse.[59] Additionally, Mrs. O'Brien, like many nonstudent spouses in her position, performed the bulk of the household duties.[60] Finally, the court observed that since the student spouse is generally unable to work full time, the couple often postpones the acquisition of

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54. *Id.* It is interesting to note that the notion of property adopted by the *O'Brien* court is similar to the "bundle of legal relations" theory first proposed by Wesley Newcomb Hohfeld in 1917 and adopted by the RESTATEMENT OF PROPERTY in 1936. *See* Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); RESTATEMENT (FIRST) OF PROPERTY §§ 1–4 (1936); *Equitable Distribution, supra* note 2, at 310–12.

55. N.Y. DOM. REL. LAW § 236(B)(5)(d)(6), (9) (McKinney 1986) (emphasis added).

56. O'Brien v. O'Brien, 66 N.Y.2d 576, 584, 489 N.E.2d 712, 715–16, 498 N.Y.S.2d 743, 746–47 (1985).

57. *Id.*

58. *Id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

59. *Id.*

60. *Id.*

tangible marital assets that might have been obtained had the student spouse been employed on a full-time basis.[61]

Thus, the *O'Brien* court used statutory text, evidence of legislative intent, and policy arguments to support its conclusion that Dr. O'Brien's medical license was marital property within the meaning of New York's Domestic Relations Law. The court also affirmed the trial court's valuation of the future earning potential of the license, as well as the trial court's sixty percent/forty percent division of value.[62]

III. THE INEQUITIES OF *STEVENS* AND *O'BRIEN*

Both the *Stevens* and the *O'Brien* courts failed in their respective efforts to provide an equitable measure of compensation to the nonstudent spouse. The *Stevens* alimony method provides for inadequate compensation to the nonstudent spouse, whereas the expectation measure as applied in *O'Brien* provides for excessive compensation. The premise upon which both cases based their compensatory measures—the future earning capacity of the professional degree or license—is the predominant reason for these inequities.

A. *Inadequacy of the Alimony Method of Compensation*

The alimony method of compensation produces an inadequate measure that does not equitably provide for the nonstudent spouse's contributions to the student spouse's professional degree or license. Since the concept of alimony originally was designed for spousal support, and not as a compensatory mechanism,[63] the limitations generally placed on alimony awards often prevent the recipient spouse from embarking on a new course in his or her life.[64] In addition, an alimony award which is based at least in part on the nonstudent spouse's contributions to the student spouse's future earning capacity runs afoul of the same types of problems that are present in a property division based on the expectation measure.[65]

Alimony awards are often subject to limitations.[66] In *Stevens*, the trial court not only limited the alimony payments to a maximum of three years but also provided that the payments would terminate upon Mrs. Stevens' cohabitation with another man, her procurement of gainful employment, or her remarriage.[67] Although the Ohio Supreme Court removed the first three of these limitations, it retained the final restriction.[68]

A three-year limitation on payments is frequently placed on alimony awards.[69] It is unjustified, however, in a case in which the nonstudent spouse has sacrificed his

61. *Id.*

62. *Id.* at 590–91, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

63. *See, e.g.*, Stevens v. Stevens, 23 Ohio St. 3d 115, 124, 492 N.E.2d 131, 138 (1986) (Douglas, J., dissenting); Fickel v. Granger, 83 Ohio St. 101, 93 N.E. 527 (1910).

64. *See infra* notes 66–75 and accompanying text.

65. *See infra* notes 83–86 and accompanying text.

66. *See, e.g.*, *Equitable Distribution*, *supra* note 2, at 332–33.

67. Stevens v. Stevens, 23 Ohio St. 3d 115, 116, 492 N.E.2d 131, 132 (1986).

68. *Id.* at 121–22, 492 N.E.2d at 136.

69. *See, e.g.*, *Equitable Distribution*, *supra* note 2, at 332–33.

or her own opportunity for educational achievement in order to help advance the education of the student spouse. Following a divorce, the spouse receiving alimony payments may want to pursue his or her own education, and a college education may well require more than three years to complete. A longer period may be required should that spouse's education continue into graduate or professional school. For these reasons, the *Stevens* court properly removed the three-year limitation on the alimony award.[70]

The second condition that the trial court placed on Mrs. Stevens' continued receipt of alimony payments was that she not "live in a state of concubinage."[71] The Ohio Supreme Court properly removed this limitation, noting that it may be irrelevant to the need for continued support.[72]

The supreme court also removed the constraint that would have terminated the alimony payments should Mrs. Stevens obtain gainful employment.[73] This also was a proper response to an inequitable restriction. Such a limitation inhibits the recipient spouse from becoming a productive member of the workforce. Moreover, the attainment of a full-time job does not necessarily remove the need for support. For instance, the job's salary may not eliminate the need for additional financial assistance, or the spouse may lose the job.

Although the Ohio Supreme Court must be applauded for lifting these three restrictions, the retention of the fourth limitation indicates the ineffectiveness of the alimony method in compensating a nonstudent spouse who has helped the student spouse attain academic and professional success. The court retained the circumscription permitting discontinuation of the alimony payments should Mrs. Stevens remarry. Apparently,[74] this restriction was retained under the presumption that Mrs. Stevens should not receive support from Dr. Stevens if she should find another husband to support her. Not only is this inference sexist and out of touch with modern social realities, it provides a potentially inequitable award for Mrs. Stevens.

It is readily apparent that any award which is based upon a recognition of the nonstudent spouse's contributions to the attainment of the student spouse's degree or license should not be limited by remarriage; surely Mrs. Stevens' remarriage would not lessen her previous contributions to Dr. Stevens' veterinary degree. In addition, such a restraint on an alimony award may inhibit the recipient from remarrying; Mrs. Stevens may be forced to decide between receiving compensation for her past efforts on the one hand, and beginning a new life with a new husband on the other. Clearly, an award that has this effect flies in the face of any social policy that seeks to encourage the members of a dissolved marriage to begin life anew.[75]

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70. Stevens v. Stevens, 23 Ohio St. 3d 115, 122, 492 N.E.2d 131, 136 (1986).

71. *Id.* at 116, 492 N.E.2d at 132.

72. *Id.* at 121–22, 492 N.E.2d at 136.

73. *Id.* at 122, 492 N.E.2d at 136.

74. The court did not explicitly address this final restriction on Mrs. Stevens' alimony award. As a result, one is forced to speculate about the court's rationale for endorsing the restriction of Mrs. Stevens' remarriage. *See id.* at 125, 492 N.E.2d at 138–39 (Douglas, J., dissenting).

75. *See id.* at 125, 492 N.E.2d at 139 (Douglas, J., dissenting).

In short, the traditional rationale behind the concept of alimony, coupled with the customary limitations placed on such awards, make the alimony method of compensating the nonstudent spouse inequitable. As explained below, this inequity is exacerbated when the court, as in *Stevens*, seeks to measure the nonstudent spouse's contributions on the basis of the enhanced earning capacity of the student spouse.[76]

B. *Deficiencies of the Expectation Measure*

The *O'Brien* court's solution to the problems presented by the student-spouse/working-spouse syndrome was, although different than that of the *Stevens* court, equally inequitable to the parties involved. The arbitrary nature of the forty percent/sixty percent division of the medical license was inherently unfair. Moreover, the expectation measure used by the court resulted in an excessive award for the nonstudent spouse.

In *O'Brien*, the trial court granted Mrs. O'Brien forty percent of the present value of the medical license.[77] The determination of the license's present value, which was found to be 472,000 dollars, was based on the enhanced earning capacity of Dr. O'Brien as a result of his acquisition of the license. Hence, the trial court determined Mrs. O'Brien's portion of the license to be 188,800 dollars.[78] This forty percent figure was affirmed by the court of appeals.[79]

Neither the trial court nor the court of appeals stated why they awarded Mrs. O'Brien forty percent of the value of the license, when in fact she had accounted for seventy-six percent of the couple's income.[80] While it could certainly be argued that awarding seventy-six percent of the license's present value to Mrs. O'Brien would have been inequitable to Dr. O'Brien, the final figure of forty percent without accompanying explanation appears little short of whimsical.[81]

This illustrates a glaring weakness of a compensatory figure based on the present value of the license. Even assuming that a reasonably reliable valuation of the license can be made, the court is nevertheless forced to make a capricious determination as to what share belongs to the nonstudent spouse. How a court is able to determine whether the nonstudent spouse is entitled to forty percent, or, say, fifty or even sixty percent of the license's value appears so subject to the personal whims and biases of the court as to render such a "calculation" nothing short of arbitrary. And certainly nothing in the *O'Brien* decision, save vague references to such phrases as "an equitable portion"[82] of the license, may be looked to by lower courts for guidance in future cases.

But the *O'Brien* approach is inequitable for yet another reason, namely the court's decision to allocate the value of the license in accordance with the expectation theory. This theory, borrowed from the law of contracts, seeks to compensate the

76. *See infra* notes 83–86 and accompanying text.
77. O'Brien v. O'Brien, 114 Misc. 2d 233, 240–42, 452 N.Y.S.2d 801, 805–06 (Sup. Ct. 1982).
78. *Id.*
79. O'Brien v. O'Brien, 66 N.Y.2d 576, 590–91, 489 N.E.2d 712, 720, 498 N.Y.S.2d 743, 751 (1985).
80. *Id.* at 581–82, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.
81. *See Equitable Distribution*, *supra* note 2, at 316–17.
82. O'Brien v. O'Brien, 66 N.Y.2d 576, 588–89, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985).

wronged party by placing that party in as good a position as he or she would have been in had no wrong occurred.[83] Applying this concept to the student-spouse/working-spouse context, the *O'Brien* court based Mrs. O'Brien's award on the future earning capacity of the license. That is, the court based the property division on that portion of Dr. O'Brien's future earnings that Mrs. O'Brien would have likely enjoyed had the parties not divorced.[84]

The expectation measure has no place in the solution to the problems presented by the student-spouse/working-spouse syndrome. An application of the expectation measure necessarily requires the final distribution to be based upon the future earning capacity of the degree or license. Such a basis, it is contended, provides for an inequitable distribution.

O'Brien presents an ideal illustration of how a distribution grounded on the license's future earning capacity may be unfair to the student spouse. The court held that Dr. O'Brien was obligated to pay his ex-wife 188,800 dollars over ten years.[85] This figure represents forty percent of the court's estimation of the present value of the medical license.

Such an approach imposes on Dr. O'Brien something very much akin to professional servitude.[86] These sizable annual payments to Mrs. O'Brien, based on nothing more than the court's expectations of Dr. O'Brien's future income, severely narrow Dr. O'Brien's career options. He is economically forced to seek a position that pays a salary commensurate with the court's expectations. No longer is he economically able to practice medicine in an organization, such as the Peace Corps, that would fail to pay what the court determined to be the average salary for a medical doctor. No longer is he economically able to forego medicine altogether for a lower-paying livelihood. Indeed, the court has narrowed Dr. O'Brien's choices to those positions that pay at, or above, the average salary of a medical doctor. Such circumscription of the student spouse's career options is inequitable.

Alternatively, an award based on the future earning capacity of the degree or license may, given a different factual setting, provide inadequate compensation to the nonstudent spouse. For example, the license in question may be one that does not measureably increase the future earning capacity of its holder. This would occur in the case of a student who earns a degree or license in a field for which there is no viable job market or in a field, such as theology, that does not provide large economic rewards. Although the nonstudent spouse's contributions to the student spouse's attainment of that degree or license may be sizable, any award to the nonstudent spouse based on future earning capacity would certainly fail to equitably compensate the nonstudent spouse.

In short, the *O'Brien* court failed to distribute the license in an equitable manner. Not only was there an arbitrary division of the license's value, but the basis of this

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83. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979).

84. O'Brien v O'Brien, 66 N.Y.2d 576, 587–89, 489 N.E.2d 712, 718, 498 N.Y.S.2d 743, 749 (1985).

85. *Id.* at 590–91, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.

86. *See Equitable Distribution*, *supra* note 2, at 306; Stevens v. Stevens, 23 Ohio St. 3d 115, 117, 492 N.E.2d 131, 132–33 (1986).

valuation—the future earning capacity of the license—is an inherently unfair measure of the nonstudent spouse's contribution to the license. Any equitable method of compensating the nonstudent spouse must therefore lie beyond the expectation measure.

IV. THE RESTITUTION MEASURE

As has been discussed in the respective analyses of the *Stevens* and *O'Brien* cases, persuasive theoretical and policy arguments exist on both sides of the issue concerning the equitable claims of ex-spouses to a professional degree or license earned during marriage. Proper resolution of this issue requires the development of a method of compensation that will equitably indemnify the nonstudent spouse for his or her contributions to the degree or license without unduly penalizing the student spouse. The most equitable method of compensation eschews both the alimony method proffered by the *Stevens* court and the expectation measure utilized by the *O'Brien* court. Instead, it is based upon the restitution measure.

The restitution method of compensation seeks to reimburse the nonstudent spouse by the amount that he or she contributed toward the attainment of the degree or license. As may be shown by an application of this method of compensation to the *Stevens* and *O'Brien* cases, an award based upon the present value of the nonstudent spouse's past contributions to the degree or license provides a figure that is equitable to both the student and nonstudent spouse. Moreover, the restitution measure is available to the court *irrespective* of its determination regarding whether the degree or license constitutes marital property.

A. *The Restitution Measure as Applied to the Facts of* Stevens

A compensatory award grounded on the restitution measure would have provided an equitable solution to the situation presented by the *Stevens* case. This argument was cogently advanced by Justice Douglas, the lone dissenter in *Stevens*.[87] Douglas argued that a "special remedy" based upon the restitution measure would preclude many of the problems that riddled the majority's alimony solution.[88] First, it would provide for a more precise figure than one based upon future earning capacity.[89] Second, it would avoid the unfair limitations that often accompany alimony awards.[90] In addition, an award based upon restitution principles would impose a less severe economic restriction on the student spouse's freedom to choose his or her livelihood. Finally, an award based upon the recoupment of sums previously expended provides for a compromise measure that avoids both the frequently excessive awards produced by the expectation measure and the often inadequate awards resulting from the alimony method.

87. Stevens v. Stevens, 23 Ohio St. 3d 115, 123, 492 N.E.2d 131, 137 (1986) (Douglas, J., dissenting).
88. *Id.* at 125, 492 N.E.2d at 139 (Douglas, J., dissenting).
89. *Id.* at 124, 492 N.E.2d at 138 (Douglas, J., dissenting).
90. *Id.* at 125, 492 N.E.2d at 139 (Douglas, J., dissenting).

Douglas' dissent was sharply critical of a mode of compensation that relies upon "'predictions' regarding the 'future earnings of a typical professional in a given field.'"[91] He properly reasoned that such a calculation was based upon factors that are highly speculative at best. These predictions are premised upon the student spouse's continued employment in the licensed profession, the typical progression with respect to career advancement, and the continued opportunity for employment in that profession. For these reasons, Douglas found an award based upon the restitution measure a more precise determinant of the nonstudent spouse's "investment" in the degree or license.[92]

Douglas emphasized that a "special award" based upon the principle of restitution could be made without the limitations that are generally affixed to alimony awards.[93] Moreover, a further advantage offered by the restitution measure is its allowance of flexibility for the student spouse's career options, which are severely restricted by the expectation measure. Under either theory, the student spouse will be forced to make relatively large payments to the nonstudent spouse. In situations such as *Stevens* and *O'Brien*, however, in which the degree or license at issue represents substantial future earning potential, the payments will be lower under the restitution measure. More importantly, the restitution method will force the student spouse into "professional servitude" only to the extent necessary to prevent his or her "unjust enrichment"[94] at the expense of the nonstudent spouse. This approach appears far more equitable than that adopted in *O'Brien*, in which the economic hardship imposed upon Dr. O'Brien was based not upon the amount by which Mrs. O'Brien had assisted him, but by the future amount that the court determined he would be able to earn in his particular profession.

B. *The Restitution Measure as Applied to the Facts of* O'Brien

O'Brien, like *Stevens*, presents a case in which application of the restitution measure would have resulted in a more equitable solution than that adopted. However, the *O'Brien* court also rejected this method. The New York Court of Appeals upheld the trial court's finding that Dr. O'Brien's medical license had a present value of 472,000 dollars.[95] This figure was based on the future earning capacity of the licensee. Although both courts held that the present value of Mrs. O'Brien's contribution to the license amounted to 103,390 dollars, she instead received the sum of 188,800 dollars, representing forty percent of the license's present value.[96]

The court of appeals should have awarded Mrs. O'Brien 103,390 dollars. This, the restitution figure, would have adequately compensated Mrs. O'Brien by awarding

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91. *Id.* at 124, 492 N.E.2d at 138 (Douglas, J., dissenting)(quoting Stevens v. Stevens, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986)).

92. *Id.* at 124–25, 492 N.E.2d at 138–39 (Douglas, J., dissenting).

93. *Id.* at 125, 492 N.E.2d at 139 (Douglas, J., dissenting). *See supra* notes 66–75 and accompanying text.

94. Stevens v. Stevens, 23 Ohio St. 3d 115, 123–24, 492 N.E.2d 131, 137–38 (1986) (Douglas, J., dissenting).

95. O'Brien v. O'Brien, 66 N.Y.2d 576, 590–91, 489 N.E.2d 712, 720, 498 N.Y.S.2d 743, 751 (1985).

96. *Id.* at 582, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

her the present value of her past contributions to the medical license.[97] Such a method for evaluating the nonstudent spouse's interest in the degree or license would provide an equitable method of compensation without attempting to whimsically choose a percentage figure that would produce a "fair" award.

The *O'Brien* court expressed doubt as to whether the restitution measure was permissible under the New York Domestic Relations Law.[98] A close examination of that statute, however, indicates that the court was indeed authorized to award the 103,390 dollar restitution figure. In discussing the equitable division of marital property, the statute states:

> In any action in which the court shall determine that an equitable distribution is appropriate but would be *impractical or burdensome* or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or *effectuate* a distribution of marital property.[99]

This provision makes the restitution measure of compensation fully within the power of New York's courts. Indeed, it appears that this section was intended for the type of "impractical or burdensome" property division involved in *O'Brien*.

The restitution measure is likewise available to jurisdictions that deem professional degrees and licenses earned during marriage to constitute marital property, but that are not controlled by a statute such as that involved in *O'Brien*. Indeed, such jurisdictions need not attempt to reconcile this method of compensation with a statute. Rather, these courts may simply hold that the restitution measure will be used to calculate the nonstudent spouse's interest in the property.

V. CONCLUSION

As this Note suggests, there are several strong arguments of both a conceptual and policy nature that may be assembled on both sides of the issue of whether a professional degree or license earned during marriage constitutes marital property. The question of vital import to the parties, however, does not involve such conceptual and policy arguments. Instead, the parties are concerned with the manner by which the nonstudent spouse is to be compensated for his or her contributions to the degree or license.

The most equitable method of reimbursement relies on the restitution measure, which seeks to compensate the nonstudent spouse by awarding him or her the present

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97. *See Equitable Distribution*, *supra* note 2, at 315–16.

98. O'Brien v. O'Brien, 66 N.Y.2d 576, 587, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985). After expressing this doubt, the court went on to state that it would not use the restitution measure even if permissible. The court attempted to support this position by forcing a weak analogy between a professional degree or license and the "price appreciation" that often follows the purchase of real estate or securities. *Id.* at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749. The court failed to recognize that the purchase of real estate or securities lacks the individuality of desire and effort inherent in the attainment of a professional degree or license. Put another way, "investment" in a medical degree is simply not analogous to investment in real estate or securities.

99. N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney 1986) (emphasis added).

value of past contributions to the degree or license. Moreover, the restitution measure is equally adaptable both to those jurisdictions that hold professional degrees and licenses earned during marriage to constitute marital property and to those jurisdictions that sustain the contrary position.

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